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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 882

BOSTON & PROVIDENCE
RAILROAD DEVELOPMENT GROUP,
PETITIONER,

v.

CHARLES W. BARTLETT, TRUSTEE, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Boston & Providence Railroad Development Group, petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on July 24, 1969.

Opinion Below

The opinion of the Court of Appeals is reported at 413 F.2d 137.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on July 24, 1969. A timely petition for rehearing was denied on August 21. (The mandate went down, following another subsidiary denial of rehearing, on September 2.) **Jurisdiction rests on 28 U.S.C. 1254(1).**

Questions Presented

In administering the Bankruptcy Act the dispositions of the district court supported by the Court of Appeals (against the interests of the debtor and its stockholders) raise these questions of due process, confiscation, and legal error:

1. May stockholders obtain judicial review of the provisions of a Section 77 plan of reorganization (never reviewed) for their railroad corporation — given the explicit statutory provision for such judicial review in subsection (f)?

2. May the plan force sale of the debtor's main line railroad to another company for use as a railroad, but at mere scrap value — notwithstanding the recent *Hudson Tubes* decision?

3. May the stockholders obtain an adjudication of the $4,801,000 claims of certain old debentures, when (a) equity and Section 77 limit participating creditors to those having proved claims, (b) the debentures have not been proved but have been persuasively denounced as invalid, (c) the plan forcibly allows their claims at full face amount costing the stockholders more than $100 per share, (d) refusal to adjudicate them for disallowance keeps the property in captivity and excludes a far more favorable settlement?

4. May the stockholders have the court proceed for conversion of surplus properties of the debtor to the Common-

wealth of Massachusetts (for highway and rail transit uses) on a nonrecurring opportunity to produce sufficient proceeds to free the debtor from bankruptcy?

5. May the stockholders obtain an adjudication of the debtor's Class I common carrier status in order to obtain vital resulting benefits (including fair divisions of rates from the through traffic) and proper annual reports?

Statutory Provision Involved

This proceeding is governed by Section 77 of the Bankruptcy Act, 11 U.S.C. 205.

See subsection (f):

> (f) Upon confirmation by the judge, the provisions of the plan and the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors, secured or unsecured, ...

Statement of the Case

The Boston & Providence Railroad Corporation built and owns the main-line railroad between those important cities, which is destined to become the head of the high-speed Northeast Corridor route. In 1888 B&P leased its railroad enterprise for a term of 99 years. The lessee agreed to pay the interest on B&P's debt ($2,170,000 in debentures) and to retire the principal during the term of the lease without expense to B&P. The lessee set up a sinking fund for that purpose.

In 1935 the New Haven Railroad Company, the lessee, went into its first Section 77 trusteeship. When the debentures fell due in 1938 New Haven's trustees defaulted

on the principal and interest and rejected and terminated the old B&P lease.

B&P, as surety for New Haven on the debentures, was caught by New Haven's default and was forced thereby into B&P's present separate Section 77 trusteeship. New Haven's trustees, however, retained B&P's lines for operation on a special agency account for B&P, the owner. A long controversy ensued over New Haven's peculiar method of allocating $220,000,000 in joint net railway operating income during the agency period through 1957 to New Haven, none to B&P. No accounts have been approved.

After the present petitioner (an independent B&P stockholder group) had obtained a 1958 clarifying amendment to paragraph (c)(6) of Section 77 affirming B&P's common carrier status with full rights to fair divisions of through rates collected from the public, New Haven offered to forget the accounting and to buy in B&P's assets on a basis to pay B&P stockholders $300 per share. Meanwhile New Haven paid off the holders of the old debentures and acquired the debenture paper. (New Haven's court had conceded B&P's claim against New Haven on the debentures.)

The present plan. New Haven's present trusteeship dumped the $300 basis in favor of a basis to pay the stockholders only $110 per share. This plan calls for New Haven to pay $4,991,000 in new bonds (N.H. trustees' obligations). N.H. would also pay $2,284,700 in cash for $110 per share on B&P's 20,770 publicly-held shares, and would contribute $1,750,980 in the form of 15,918 B&P shares cancelled at $110 each.

New Haven's real estate officer estimated B&P's scrap value at $9,500,000. Some accounting legerdemain was added to bring the face amount of the plan price $9,026,680 up to scrap value, which was then (before the 1967 *Hudson Tubes* decision) regarded as minimum just compensation.

The plan required B&P to apply the $4,991,000 new bonds to "pay" the old debentures. (But New Haven has conceded that if B&P is not liable to New Haven on the old debentures, the new bonds may go to B&P's stockholders — at $124.90 per share, plus interest from 1964.)

New Haven got a Wall Street stockholders committee to support its $110 plan. On petitioner's opposition, however, the proponents failed to prove that their price was fair. Thereupon New Haven agreed to allow B&P stockholders to participate in proceeds of New Haven's future sales of B&P surplus real estate for *non-railroad* uses. That concession has been gravely weakened by the fine-type clause added to the plan — New Haven is to decide what real estate to sell, and when to sell it, and will apply the proceeds first to pay taxes and expenses generated by the sale (including N.H. removal and relocation costs). The B&P stockholders, holding certificates of beneficial interest, may participate *if* the proceeds exceed $500,000 per sale and *if* New Haven (or its successor) shall make the sale before 1979.

At the end of 1968 New Haven turned over its railroad business to the Penn Central Company, which would acquire New Haven's rights in B&P's properties under the plan (without N.H.'s accrued tax losses). Penn Central is now operating B&P's lines as a temporary agent without any agreement with B&P.

Meanwhile B&P's property values have risen and will continue to rise. Most important looms the coming federal Boston-Washington high-speed railroad corridor. (Connecticut and New York are already taking over the section between New York and New Haven for $80,000,000, according to current press reports.) The plan bars B&P stockholder participation in the corridor, since that would be railroad use, for which the plan only allows B&P scrap value. B&P Providence and Boston real estate offer re-

markable opportunities for development. Under the present plan these properties can be expected to lie fallow until the B&P stockholders shall be finally washed out at the end of 1978. *Absent* the plan the B&P owners can do far better.

The Commission approved the plan *only* on the condition that the district court should find the debentures valid — otherwise it would be adjusted to allocate the new bonds to the stockholders. The district court has refused to pass on the debentures, but issued an interlocutory order approving the plan for submission to the security holders. Despairing of judicial relief, most of the security holders therefore voted for the plan. (The illusory elements in the real estate clause were not yet apparent to the average stockholder.)

The district court's final order. On November 4, 1968, the district court entered its final order, which confirmed the plan. Petitioner sought appellate review of the plan, invoking the judicial review clause in Section 77 (f).

The Court of Appeals perceived that petitioner had sought judicial review of the plan following the earlier interlocutory order of approval. Petitioner had not obtained judicial review then; the effort was unsuccessful, and the Supreme Court declined to compel review — doubtless being influenced by the interlocutory stage of the proceedings. In its present opinion the Court of Appeals says that petitioner should not get double judicial review of the provisions of the plan — which petitioner concedes.

Petitioner has been unable to get the plan reviewed once. In order to get active administration of the judicial protection contemplated by Section 77, petitioner filed some administrative motions which languished in the district court. Eventually petitioner treated the court's protracted inaction as denial *sub silentio*. One motion asked the court to pass on the debentures. Another asked it to proceed for

conversion of a B&P route for a highway and rail transit suburban corridor, then desired by the Commonwealth. (A large part of the opportunity has been lost this year, given the court's inaction and New Haven's and Penn Central's calculated inertia.) Another asked the court to require B&P to be treated as a carrier according to the requirements of paragraph (c)(6) of Section 77 and to file annual reports properly. (See Question 3, 4, 5.)

The Court of Appeals recognizes the denials *sub silentio.* (See footnote 6 in its opinion.) But it says that (although earlier appeal before confirmation would have been too soon) now appeal is too late.

The B&P proceedings represent an intolerable breakdown of judicial protection.

Reasons for Granting the Writ

The careful judicial administration of the protective procedures of the Bankruptcy Act is a matter too important to be slighted.

The B&P controversy is sizeable and important. Railroad reorganizations are public affairs. The regional public interest in obtaining full imaginative utilization of B&P's properties in urban renewals flows with petitioner's interest in obtaining fair value for the stockholders instead of multi-million-dollar judicial confiscation through forced sale and forfeiture.

Public confidence in judicial administration is at stake. Due process is denied.

The First Circuit has departed so far from the accepted and usual course of judicial proceedings as to require this Court's supervision. Its refusal to review the provisions of the plan of reorganization once is without precedent. It directly violates the plain review clause of Section 77(f). "Upon [i.e., *after*] confirmation by the judge, the pro-

visions of the plan and the order of confirmation shall, subject to the right of judicial review, be binding ..." Nothing can be plainer than that.

No precedent supports the First Circuit's double refusal. The precedents in other circuits conflict. To be sure, in several cases review of the plan was obtained after the interlocutory order of approval—and doubtless one review of the plan would be enough. But in two major Section 77 cases in the Seventh and Tenth Circuits the plan was judicially reviewed after confirmation. *In re Chicago & N. W. Ry. Co.*, 126 F.2d 351, 354; *In re Denver & R. G. Ry. Co.*, 150 F.2d 28, 33. Protective appeals from a preliminary approval order lay in abeyance for consideration with subsequent appeals against the plan that were not filed until after confirmation.

The First Circuit's first refusal could be condoned as interlocutory. But its second refusal is final. The combination forms a procedural avoidance that cannot be tolerated in 1969.

The language of subsection (f) was added to Section 77 by amendment after extensive hearings. (Hearings on H.R. 6249, April 1935.) Cassius M. Clay, Esq., the distinguished railroad counsel to the sponsoring R.F.C., explained its importance, saying:

> "We are dealing with a vital thing here, of course. The sentence refers to the final order of the court confirming the plan."

The purpose was to insure the right to judicial review of the provisions of the plan at the critical moment when it would become binding. Section 77 does not call for earlier review of the plan. A practice of allowing judicial review after the interlocutory order of approval cannot be taken

as foreclosing the *statutory right* to judicial review following confirmation.

Thus Section 77 accords with parallel provisions for non-railroad corporations. See *Collier on Bankruptcy,* James William Moore, editor-in-chief, 14th ed., vol. 6, ¶ 7.41:

> "But approval of a plan does not mean that the plan will automatically be confirmed. . . .
>
> Those objecting to confirmation, therefore, may assert any ground which prevents confirmation under § 221, whether it is new or was previously presented as a bar to the approval of the plan."

The present plan has never been reviewed.

The old scrap value test of minimum just compensation for condemning a railroad (or forcing a judicial sale through a plan of reorganization) for use as a railroad was rejected in *Port Authority Trans-Hudson Corp.* v. *Hudson Rapid Tubes Corp.*, 20 N.Y. 2d 457, 231 N.E. 2d 734 (1967). (This Court denied certiorari in 1968). The B&P plan requires sale of the railroad for use as a railroad at scrap value. It is a scrap value plan (except for contingencies in non-railroad real estate). It thus conflicts with *Hudson Tubes.*

Closer to home, it conflicts with the 1967 Massachusetts decision, *Commonwealth* v. *Massachusetts Turnpike Authority,* 352 Mass. 143, 147, 224 N.E. 2d 186.

Conclusion — simple and just solution

For the foregoing reasons petitioner prays this Court to grant the writ. It can simply require the Court of Appeals to review the plan; in this way the Supreme Court need not get involved in the plan issues on their merits. If the Court of Appeals were so instructed, it would pre-

sumably review the plan justly and quickly. That should benefit the public interest and would probably improve the B&P owners' lot by $10,000,000. It would restore confidence in the judicial process.

Respectfully submitted,

ARMISTEAD B. ROOD
Attorney for Petitioner

November 19, 1969

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 7300.

In the Matter of
BOSTON & PROVIDENCE
RAILROAD CORPORATION,
DEBTOR,

BOSTON & PROVIDENCE RAILROAD
DEVELOPMENT GROUP,
APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

Armistead B. Rood, *Joseph B. Hyman* and *Lawrence T. Perera* for appellant.

Robert W. Meserve, with whom *Benjamin H. Lacy*, *Charles W. Mulcahy, Jr.*, *Laurence M. Channing*, *Rya Featherston*, *James Garfield*, *Nutter, McClennen & Fish*, *Mulcahy & Mulcahy*, *Hill & Barlow*, and *Choate, Hall & Stewart* were on brief, for appellees.

July 24, 1969.

MCENTEE, *Circuit Judge*. Efforts have been underway since 1938 to reorganize the Boston & Providence Railroad Corporation (debtor) in accordance with § 77 of the Bankruptcy Act, 11 U.S.C. § 205. Understandably, various plans have been spawned during the more than thirty years since that time. It will be sufficient for our purposes, however,

to trace the history and frustrations of the last of these efforts, the 1966 plan.[1]

This plan was approved in 1966 by both the Interstate Commerce Commission, see *Boston & Providence R. R. Reorganization,* 327 I.C.C. 10 and by the District Court for the District of Massachusetts. See *In re Boston & Providence R. R.,* 260 F.Supp. 415 (1966) [2] and an appeal to this court by the Boston & Providence Stockholders Development Group (Group),[3] the appellant herein, was dismissed in 1967 for want of diligent prosecution, *cert. denied,* 389 U.S. 974 (1967). Thereafter the plan was approved by the creditors and stockholders, and after one further trip back to the Commission for reconsideration, see *Boston & Providence R. R. Reorganization,* 333 I.C.C. 713 (1968), it was at long last confirmed by the district court.

By now the central issue before us is relatively simple: Can the Group, under the guise of an appeal from the confirmation order, relitigate the issues that were settled against it by the dismissal of its appeal from the district court's order approving the reorganization in 1966? The answer must be in the negative.

---

[1] One interested in a further history of these transactions may profitably consult the detailed opinion of this court in *Freeman* v. *Mulcahy,* 250 F.2d 463 (1st Cir. 1957), *cert. denied,* 356 U.S. 939 (1958).

[2] The provisions of the 1966 plan are analyzed in the district court's opinion.

[3] The Group, representing approximately ten per cent of the debtor's stock in the public class, first came on the scene in 1954 because of dissatisfaction with the provisions of a suggested plan of reorganization then current. It has been most active in the subsequent stages of litigation. It apparently adopted the Development Group title because of what it regarded as a particular concern to develop B. & P. properties, especially through realization of the increasing values of properties in nonrailroad uses. The Group is to be distinguished from the Boston & Providence Railroad Corporation Stockholders Committee, which holds the bulk of B. & P. stock in the public class and was the original sponsor of the pending plan.

The district court found in substance that the plan had been accepted by the requisite proportion of creditors and stockholders of each class to which submission was required and that these acceptances were not made or procured by any means forbidden by law. It is the debtor's position [4] that only questions arising in connection with the confirmation order and any change in circumstances since the approval order are still open on this appeal. The Group, on the other hand, contends that it is free to raise questions as to whether the underlying plan, long since approved, is fair and equitable.

We start with the statute:

> "Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it." 11 U.S.C. § 205(f).

The Group contends that it is clear from the wording of this statute that judicial review is available "upon confirmation" both of the order of confirmation and of the provisions of the plan. They cite *In re Chicago & N. W. Ry.*, 126 F.2d 351, 354 (7th Cir. 1942), *cert. denied*, 318 U.S. 793 (1943) and *In re Denver & R. G. W. Ry.*, 150 F.2d 28, 33 (10th Cir. 1945), *rev'd on other grounds*, 328 U.S. 495 (1946), as instances in which such review was actually accorded.

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[4] The appellees in this case include not only the debtor but also B & P Railroad Corporation Stockholders Committee, a Trustee in Reorganization of the B. & P. and a Trustee in Reorganization of the New York, New Haven and Hartford Railroad Company.

In our opinion, however, this interpretation is not compelled either by the terms of the statute or by the cited cases. The terms of the statute are merely congruent with the situation that arises when no appeal at all is taken until after confirmation and thus both appeals can be consolidated. In such a case the entire review would take place after confirmation. But the essence of the statute is that review of both approval and confirmation be available, not that they both be available after confirmation. The two cases cited by the Group may be thus explained. In neither is there any discussion of a prior review of approval. Rather, in these cases it was possible to consolidate all the issues into one appeal.[5]

We assume, without deciding, that appellant had an election of whether to appeal from approval or confirmation. Appellant appealed unsuccessfully from the district court's order of approval and it must be bound by its action. To be sure, the appeal was not considered on its merits but unlike dismissal of a complaint, dismissal of an appeal always involves prejudice in the ordinary case because the period for appeal will have lapsed. The result should not be different in a chapter 77 case merely because of the subsequent act of confirmation. To hold otherwise would permit appellant to delay and put its adversaries to great expense at no cost to itself.

While this discussion disposes of the Group's appeal for the most part, a few additional comments are in order.

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[5] In addition, *Denver*, *supra*, was a case in which certain creditors whose approval was necessary had not accepted the plan. This provided a special basis for examining the merits of the plan for the protection of these dissenting creditors under § 205(e): "*Provided*, That if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it, that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts. . . ."

The Group also complains that the plan is defective in limiting the payment of all reorganization expenses to a figure less than the allowances approved or to be approved by the Commission. This appeal was presented twice on oral argument. After the first argument, we specially requested the Commission to consider the Group's interpretation of the plan on this point. Subsequently, the Commission, considering this matter on an expedited basis, ruled that the pertinent section of the plan does not impose a maximum limit on the amount of the administration claims but governs the amount to be kept available at the time of consummation of the plan; and that accordingly there is no need for the plan to be amended. Thus the Group's complaint in this regard is based on an incorrect factual premise.

Whatever the original merits of the plan, the Group now contends that it must be reassessed in the light of *Port Authority Trans-Hudson Corp.* v. *Hudson Rapid Tubes Corp.*, 20 N.Y.2d 457, 231 N.E.2d 734, 285 N.Y.S.2d 24 (1967), which rejected the scrap value test as the sole standard of valuation. But the Commission has already concluded that *Hudson Tubes* does not constitute a "new development" such that reconsideration of the plan would be justified. *Boston & Providence R. R. Reorganization*, 333 I.C.C. 713, 718 (1968). In any event, it is not true that the plan in question here takes only scrap value into account. The plan provides, in addition to an outright payment to stockholders, for Certificates of Contingent Beneficial Interest to allow further receipts for stockholders in the event that the potential for sale of real estate for nonrailroad uses should be realized. See *In re Boston & Providence R. R.*, *supra* at 418. If there should be occasion for applying the *Hudson Tubes* rule to B. & P. property, the resulting benefit would enure to the certificate holders.

The last contention to be considered may be dismissed summarily. The Group complains that the vote of the stockholders approving the plan was induced by representations of tax benefits that are not materializing. We need only remark that nothing in the record before us has been suggested that supports these allegations concerning what motivated the stockholders.[6]

We, therefore, conclude that the district court did not err in confirming the Plan of Reorganization and did not abuse its discretion in denying the Group's motion of November 4, 1968, to return the plan to the Commission.

Affirmed.

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[6] On May 23, 1969, the Group filed a "Supplemental Notice of Appeal" (Docket Number 7350) in connection with the following denials of the district court. (1) Denial of the Group's Motion of September 26, 1966, for the District Court to decide whether B. & P. is liable on certain debentures. (2) Denial of the Group's petition of August 23, 1965, for the District Court to proceed for the accomplishment of major sales of properties of B. & P. in the Boston area. (3) Denial of the Group's Motion of April 3, 1959, for an order declaring B. & P. a class I line-haul carrier and not a mere lessor. (4) Denial of an amended Motion in connection with 3, *supra*, filed on or about October 16, 1963.

The debtor has moved to dismiss these appeals as untimely and we think that its motion must be granted. The district court never actually denied said motions and petition and it is the Group's theory that at some point it ought to be able to treat them as denied *sub silentio*. This may well be true but if they were denied by implication at all, this surely occurred no later than when the district court confirmed the plan on November 4, 1968. In view of the above we need not consider the debtor's "Second Motion to Dismiss Appeals" and the Group's answer thereto.

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BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Petitioner,
v.
CHARLES W. BARTLETT, TRUSTEE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI.

JOINT BRIEF FOR CHARLES W. BARTLETT, TRUSTEE IN REORGANIZATION OF THE BOSTON & PROVIDENCE RAILROAD, THE BOSTON & PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS COMMITTEE, THE BOSTON & PROVIDENCE RAILROAD CORPORATION, DEBTOR, AND RICHARD JOYCE SMITH, TRUSTEE OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, RESPONDENTS, IN OPPOSITION.

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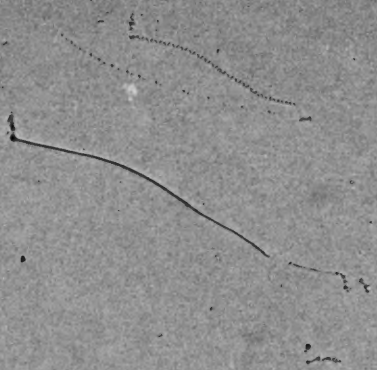

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Questions Presented.

1. Should the Supreme Court entertain a petition for certiorari filed, without any extension of time having been

granted, ninety-five days after the date on which the Court of Appeals for the First Circuit entered its order denying rehearing of the judgment now sought to be reviewed?

2. Did the Court of Appeals properly hold that the petitioner was not entitled, on an appeal from confirmation of the debtor's plan of reorganization, to raise again questions concerning the provisions of the plan which had been the subject of Petitioner's previously dismissed appeal from the District Court's order approving the plan?

3. Did the Court of Appeals properly dismiss, as untimely, Petitioner's supplemental notice of appeal (filed more than six months after confirmation and more than five months after denial of Petitioner's motion to amend the order of confirmation) raising additional questions previously disposed of by the dismissal of the appeal from approval of debtor's plan of reorganization?

Statutes and Rules of Court Involved.

Relevant portions of 28 U.S.C. Section 2101; of Supreme Court Rules 21 and 22; and subsections (e) and (f) of Section 77 of the Bankruptcy Act (11 U.S.C. Section 205(e) and (f)) are printed in Appendix A hereto.

Statement of the Case.

The pending plan of reorganization of the Boston & Providence Railroad Corporation (the "Debtor") was confirmed by the United States District Court for the District of Massachusetts (the "District Court") on November 4, 1968. In accordance with the requirements of Section 77 of the Bankruptcy Act (11 U.S.C. Section 205), the plan had previously been approved by the Interstate Commerce Commission (327 I.C.C. 10, March 11, 1966) and by the

District Court. *In re Boston & Providence Railroad Corporation,* 260 F. Supp. 415 (November 28, 1966). Petitioner's appeal from the District Court's order and opinion approving the plan was dismissed* by the Court of Appeals for the First Circuit ("Court of Appeals") on March 29, 1967. Rehearing was denied* on April 18, 1967, and the Supreme Court denied certiorari and Petitioner's motion for leave to file a petition for a writ of mandamus on December 4, 1967. *Boston & Providence Railroad Stockholders Development Group* v. *Bartlett,* 389 U.S. 974, and *Boston & Providence Railroad Stockholders Development Group* v. *United States Court of Appeals for the First Circuit,* 389 U.S. 967.

Thereafter, the approved plan was submitted to the creditors and stockholders of the Debtor and was overwhelmingly approved by them. However, because the proceedings had been delayed, by reason of the Petitioner's unprosecuted appeal and other tactics, by more than 18 months after certification of the plan by the Interstate Commerce Commission (the "Commission") to the District Court, Petitioner was able by its petition of April 19, 1968, as a matter of right, to require the Commission to consider whether changes or developments had occurred which required it to reconsider the plan (11 U.S.C. 208(a)(1)). After due deliberation, the Commission on September 16, 1968, denied the petition and on October 31, 1968, denied reconsideration. Thus, on November 4, 1968, the District Court was at last able to enter its order confirming the plan. Petitioner's motion to amend the order of confirmation was denied on December 4, 1968, and on Febru-

*The opinions of the Court of Appeals, which are not reported, are set forth in Appendices A and B to Petitioner's motion for leave to file a petition for a writ of mandamus. Supreme Court of the United States, Oct. Term, 1967, No. 661, Misc.

ary 3, 1969, Petitioner filed a notice of appeal from the confirmation order and certain other orders of the District Court also entered on or about November 4, 1968.

On July 24, 1969, the Court of Appeals affirmed the District Court's order confirming the plan and entered judgment. Its opinion is printed in full in the appendix to Petitioner's present brief. On August 21, 1969, rehearing was denied by the Court of Appeals. Ninety-five days thereafter, on November 24, 1969, Petitioner filed its present petition for writ of certiorari ("Petition"), having previously (on the ninety-first day) requested an extension of time which was denied.

Argument.

I.

The Present Petition for a Writ of Certiorari should be Dismissed as Untimely.

28 U.S.C. Section 2101(c) requires that an application for any writ of certiorari to review a civil proceeding be made within 90 days after the entry of the judgment sought to be reviewed, unless one of the justices, for good cause shown, extends the time for applying by not more than 60 days. The 90-day period is to be measured from the date of the judgment below, or, where a petition for rehearing has been entertained and denied, from the date of such denial. *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 149-150 (1942).

In the present case, Petitioner should have filed its Petition and the certified transcript of the record not later than November 19, 1969, the ninetieth day following the denial of Petitioner's petition for rehearing by the Court of Appeals. 28 U.S.C. Section 2101(c); Supreme Court Rules 21 and 22. Petitioner did neither, but merely sent

a telegram to the Clerk of the Supreme Court, on November 20, 1969, asking for an extension of the time for filing. This request was denied on November 24, 1969. The Petition having been filed more than 90 days after the denial of rehearing below, and Petitioner's request for extension of time for filing the Petition also having been denied, the Petition should be denied as untimely.

This is the third time since it made itself a party to these proceedings in 1954 that Petitioner has applied for a writ of certiorari herein. Petitioner's principal counsel, who filed all three of these petitions, may be presumed by now to be thoroughly familiar with the Supreme Court's requirements with respect to timely filing. There is, we submit, no reason and no basis for indulging Petitioner further in this matter.

II.

The Court of Appeals Properly Held that the Petitioner was Not Entitled on an Appeal from Confirmation to Raise Questions Concerning the Provisions of Debtor's Plan of Reorganization which had been the Subject of Petitioner's Previously Dismissed Appeal from Approval of the Plan.

In this proceeding, as in most railroad reorganization proceedings under Section 77 of the Bankruptcy Act,* the opponents of the plans of reorganization which have been certified by the Commission and approved by the District Court have chosen to challenge the provisions of those plans by appeals from the District Court's orders of approval. Thus in *Freeman* v. *Mulcahy*, 250 F. 2d 463 (1st

*E.g., *In re Chicago, M., St. P. & P. R. Co.*, 124 F. 2d 754 (7th Cir. 1942) and *In re New York, New Haven & Hartford Railroad Co.*, 147 F. 2d 40 (2d Cir. 1945).

Cir. 1957), cert. and rehearing den., sub nom. *Boston & Providence Railroad Corporation* v. *New York, New Haven & Hartford Railroad Co.*, 356 U.S. 939 and 357 U.S. 915 (1958), the provisions of the Debtor's plan approved by the Commission in 1954 and by the District Court in 1956 (*In the Matter of Boston & Providence Railroad Corporation*, 143 F. Supp. 866) were fully reviewed by an appeal to the Court of Appeals, in which Petitioner joined. Following this ready precedent, Petitioner, on February 15, 1967, docketed an appeal from the District Court's order and opinion of November 4, 1966, approving the present plan of reorganization of the Debtor.

The course of that appeal (the 1967 appeal) to the time of its dismissal for lack of diligent prosecution, is traced in the several briefs filed by the Respondents in opposition to Petitioner's 1967 petitions to this court seeking writs of certiorari and mandamus. Supreme Court of the United States, October Term, 1967, Nos. 624 and 661, Misc. This court denied both petitions on December 4, 1967. *Boston & Providence Railroad Stockholders Development Group* v. *Bartlett*, 389 U.S. 974, and *Boston & Providence Railroad Stockholders Development Group* v. *United States Court of Appeals for the First Circuit*, 389 U.S. 967.

The Court of Appeals held, in the instant appeal, that the Petitioner could not, under the guise of an appeal from the confirmation order, "relitigate the issues that were settled against it by the dismissal of its appeal from the District Court's order approving the reorganization . . ." *In re Boston & Providence Railroad Corporation, Debtor*, 413 F. 2d 137, 139; Petition, Appendix A, page 12 (1969).

Respondents submit that the Court of Appeals was correct in so holding. Petitioner's assertion that it is entitled to reargue these previously settled points is based upon a misinterpretation of the first clause of Section 77(f) of

the Bankruptcy Act (11 U.S.C. Section 205(f)) which states that "Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders . . . and all creditors . . ." Petitioners argue that "upon" means "after," but it is only the review of the provisions of the order of confirmation and the binding of the parties which necessarily follow "upon" or "after" (and as a consequence of) confirmation, *not* the review of the provisions of the plan which, in the statutory scheme of Section 77, are fixed by the earlier order of approval. A practice of making all provisions of a plan of reorganization subject to a post-confirmation appeal, even when previously raised in an earlier appeal, would constitute a great and vexatious waste of time for the District Court and all appellate courts and a wholly unnecessary burden and expense for the parties to the reorganization proceeding. In this very case, we have seen that, by bringing an appeal at the beginning of 1967, Petitioner was able, despite every effort of the proponents of the plan to expedite proceedings, to delay confirmation until November, 1968. To hold, in effect, that these two years, and all the labor and expense that went into them, are of no consequence would be to make a mockery of the Bankruptcy Act and of the judicial process. *White* v. *Higgins,* 116 F. 2d 312 (1st Cir. 1940).

The cases in other circuits do not conflict. The Court of Appeals has quite properly distinguished the only cases which Petitioner has cited (*In re Chicago & N. W. Ry. Co.*, 126 F. 2d 351, and *In re Denver & R. G. W. Ry. Co.*, 150 F. 2d 28) as cases in which no appeals had been taken prior to confirmation.

Petitioner seeks support for its position in a comment in Collier on Bankruptcy, 14th ed. (vol. 6, §7.41) concerning the review of a plan of corporate reorganization under

Chapter X of the Bankruptcy Act. But the prerequisites for confirmation set forth in §221 of Chapter X (11 U.S.C. Section 621) are not the same as those for confirmation of a plan of reorganization of a railroad under Section 77. Section 221 provides that the judge shall confirm a plan of corporate reorganization if satisfied that its provisions are in compliance with Article VII, §199 and Article X of Chapter X, that it is fair, equitable and feasible, and that its proposal and acceptance are in good faith and have not been made or procured by improper means. Section 180 of Chapter X, moreover, expressly provides that the order of the judge approving a Chapter X plan shall not affect the right of the debtor, a creditor, indenture trustee or stockholder to object to the confirmation of the plan.

Section 77(e), on the other hand, directs that the judge shall confirm a plan of railroad reorganization if satisfied that it has been accepted by the necessary percentages of creditors and stockholders and that such acceptance has not been procured by improper means. Thus, Chapter X requires reexamination of the provisions of a corporate plan as a part of the confirmation process, while §77 provides for examination of the provisions of a railroad plan, by the judge, only at the time of approval and excludes such examination from the confirmation process, except in the case of a confirmation made by the judge after the creditors and stockholders have failed to accept the same.

The foregoing distinction between Chapter X and §77 proceedings is not accidental, for it will be remembered that before a §77 plan is approved by the judge it will already have been approved by the Commission after hearing and review. Moreover, if 18 months intervenes between the District Court's approval and confirmation, any party may, under 11 U.S.C. §208(a) (1), require the Commission

to consider whether changes or developments have occurred which in equity require that the plan be reexamined. Petitioner has had the benefit of this administrative remedy. Indeed the Commission's denial of rehearing of Petitioner's Section 208(a) (1) petition was handed down on October 31, 1968, less than a week before the judge's order of confirmation.* There is thus no basis in the Bankruptcy Act or in equity for conferring upon Petitioner a right of repetitive review by the Court of Appeals.

Petitioner's objection to the Debtor's plan of reorganization based on the *Hudson Tubes* case (*Port Authority Trans-Hudson Corp.* v. *Hudson Rapid Tubes Corp.*, 20 N.Y. 2d 457, 231 N.E. 2d 734 (1967)) was fully considered both by the Commission in the above-mentioned Section 208(a) (1) proceeding (*Boston & Providence Railroad Corporation Reorganization*, 333 I.C.C. 713 (1968)) and by the Court of Appeals (*In re Boston & Providence Railroad Corp.*, 413 F. 2d 137, 140; Petition, Appendix A, page 14 (1969)). Both tribunals properly rejected this argument for the fundamental reason that the present plan is not a "scrap value" plan but one which, through the issuance of certificates of contingent beneficial interest to the shareholders makes provision for those extra elements of value which the Petitioner claims that the plan of reorganization, the Commission and the courts have ignored.

III.

The District Court Properly Dismissed Petitioner's Supplemental Notice of Appeal.

The last three questions presented by the Petition were the subject of the supplemental notice of appeal filed by Petitioner on May 23, 1969, on the eve of oral argument of

*Petitioner took no appeal from the Commission's order.

the 1969 appeal. The Court of Appeals dismissed these appeals as untimely, pointing out that the motions and petition in question had all become ripe for appeal not later than November 4, 1968, the date of the confirmation of the Debtor's plan of reorganization which rendered them all moot. The said supplemental notice should have been filed not more than 60 days after November 4, 1968. Federal Rules of Appellate Procedure, Rules 2 and 26(b).

It may also be noted that these supplemental appeals are largely restatements of points 1(e), 3 and 2, respectively, of *Appellant's Statement of Intended Points* filed in the 1967 appeal, disposed of by the dismissal thereof. See Appendix B, below.

Conclusion.

For the foregoing reasons, the Respondents hereby respectfully request that the Petition be denied.

Respectfully submitted,

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Appendix A.

Relevant Statutes.

Paragraph (c) of 28 U.S.C. 2101 reads as follows:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Paragraph 1 of Rule 21 of the Supreme Court Rules reads as follows:

> "1. Review on writ of certiorari shall be sought by filing with the clerk, with proof of service as required by Rule 33, forty printed copies of a petition, which shall conform in all respects to Rule 23, and a transcript of the record in the case, including the proceedings in the court whose judgment or decree is sought to be reviewed, which shall be certified by the clerk of the appropriate court or courts below. The entire record in the court to which certiorari is addressed shall be filed unless the parties agree that specified parts may be omitted as unnecessary for the determination of the petition or of the writ, if it be granted. The provisions of Rule 12 (3) with respect to original papers shall apply to all cases sought to be reviewed on writ of certiorari. Service of a copy of the transcript of the record is not required."

Paragraphs 3 and 4 of Rule 22 of the Supreme Court Rules read as follows:

"3. A petition for writ of certiorari in all other cases shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within the time prescribed by law.

"4. An application for extension of time within which to file a petition for writ of certiorari must set out, as in a petition for certiorari (see Rule 23(1), subparagraphs (b) and (f)), the grounds on which the jurisdiction of this court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is deemed justified. For the time and manner of presenting an application for extension of time within which to file a petition for writ of certiorari, see Rules 34, 35(2), and 50. Such applications are not favored."

Section 77(e) of the Bankruptcy Act (11 U.S.C. 205(e)) reads, in part, as follows:

"If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and

order of the judge . . . The Commission shall certify to the judge the results of such submission.

"Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided,* That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e)."

Section 77(f) of the Bankruptcy Act (11 U.S.C. 205 (f)) reads, in part, as follows:

"(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it,

and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it."

Appendix B.

RELEVANT PORTIONS OF APPELLANT'S STATEMENT OF INTENDED POINTS IN THE 1967 APPEAL.

1(E), 2 and 3 of the *Appellant's Statement of Intended Points* filed by the Respondent as Appellant in the case of *Boston and Providence Railroad Stockholders Development Group* v. *Charles W. Bartlett, Trustee, et al.*, United States Court of Appeals for the First Circuit, No. 6873, (1967) read as follows:

"E. The plan would force the Debtor to surrender $4,991,000 in new bonds plus a sinking fund worth approximately $1,000,000 in order to satisfy claims for principal and interest on $2,170,000 in old debentures, although the Debtor was liable only as surety on the debentures, which were extinguished long ago when the principal obligor acquired them after maturity by satisfying the holders.

. . . . . .

"2. The District Court erred in not requiring the Debtor and its Trustee to file current annual reports to the Commission as a Class I line-haul common carrier under Section 20 of the Interstate Commerce Act, instead of filing detrimentally as a lessor and on the lessor form.

"3. The District Court erred in refusing to hear Appellant's petition filed August 27, 1965, relative to sale of the Debtor's railroad properties north of Readville and Dedham to the Commonwealth of Massachusetts (or agencies thereof) and abrogation of franchise obligations now covering such properties, so as to accomplish those results efficiently in the interest of all concerned by adding appropriate provisions to the plan."

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 882

BOSTON & PROVIDENCE RAILROAD DEVELOPMENT GROUP,
PETITIONER,
v.
CHARLES W. BARTLETT, TRUSTEE, et al.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI.

PETITION FOR REHEARING AND SUPPLEMENTAL PETITION UNDER 11 U.S.C. 208

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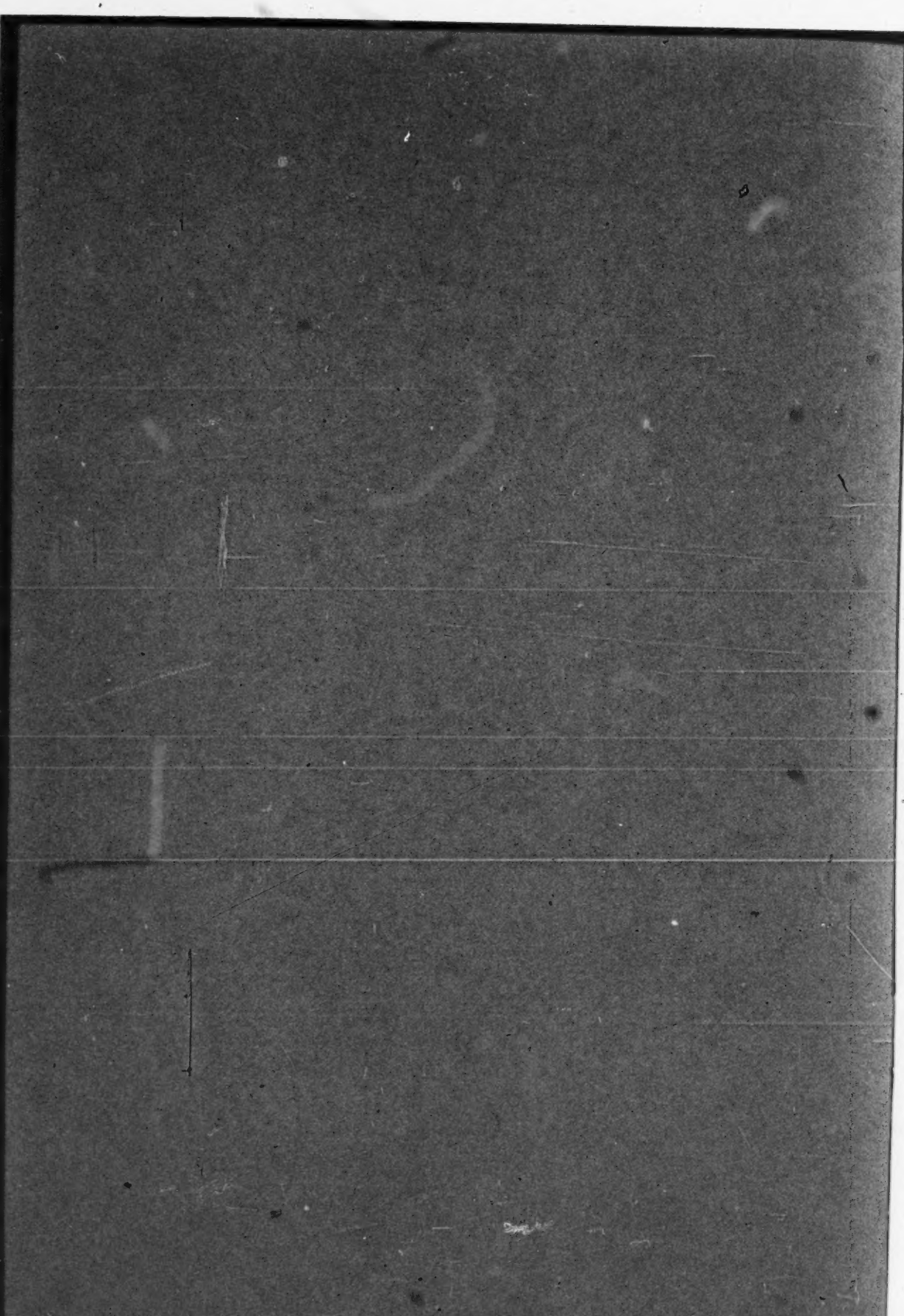

PETITION FOR REHEARING AND SUPPLEMENTAL PETITION UNDER 11 U.S.C. 208

Status of the Proceeding

This Court denied the petition for certiorari on March 16.

This Court has not acted on the two petitions requesting return of the B&P 1966 plan of reorganization to the I.C.C. for reexaminations in light of new "changes, facts, and developments", claiming the special relief provided by paragraph (2) of 11 U.S.C. Section 208(a).

The first Section 208 petition was filed by the Greater Boston Committee on the Transportation Crisis, with motion for leave to intervene in this B&P reorganization proceeding as a party on behalf of the intense local public interest. The Committee is an active Brandeis-type civic coalition. (See Mason: *Brandeis, A Free Man's Life*, index citations on the Public Franchise League.) It has standing to intervene. (See 7 Law & Contemporary Problems 495, *Protecting the User Interest in Railroad Reorganization*.)

The Boston & Providence Railroad Development Group filed the second Section 208 petition, by right. (The Development Group has been a party since 1954, standing as a fiduciary for the B&P stockholder class. Since 1963 it has been the only party of B&P security holders not committed to the old New Haven.

The Clerk's letter. In the absence of Court action on the Section 208 petitions by March 30, the Development Group's attorney wrote a letter of inquiry to the Clerk, who answered by letter of April 7 thus:

> "In reply to your letter of April 2, I wish to confirm the fact which I told you orally last week that the

Court considers its order of March 16 as disposing of the entire case before it and that you should not anticipate any separate actions on the motions [*i.e.*, the Section 208 petitions] that have been filed."

His explanation. The letter recorded the Clerk's oral statement of April 3. At that time Mr. Davis explained that the Court was aware of the Section 208 petitions (or motions) but had decided not to act on them explicitly, because (*a*) it was believed that such action would require the Court to make a necessary finding (*b*) which would require the Court to grant certiorari, whereas (*c*) the Court wished to avoid granting certiorari.

The Development Group's counsel are surprised by this view. They expected the Court to grant their Section 208 petition even if it should not grant certiorari.

Section 208 requires more than denial *sub silentio*

First impression. Apparently this is the first time that Section 208 relief has been claimed in this Court. The reason why Congress enacted Section 208 was to provide relief against the sort of judicial foreclosure that this Court administered to petitioner on March 16. It is not enough to brush off petitioner's right under Section 208 *sub silentio*. Petitioner is entitled to have its right passed on deliberately and formally.

The senior justices will remember that Section 77 was enacted hastily to deal with the railroad insolvencies of the Depression. Section 77 became effective on March 3, 1933. It reformed the procedures of equity reorganization. It drafted the I.C.C. to serve as an expert judicial arm by (1) "determining" prospective earning power, (2) capitalizing it into a new reduced valuation, and (3) designing

a new set of reorganization securities within the valuation limit.

The Commission conjured up its earning power forecasts out of the Marathon records compiled before it in the ruinous context of the Mid-Thirties. When the forfeiting junior security holders sought judicial protection, they found appellate relief blocked by the substantial evidence rule — and by judicial deference to the Commission, which was still our most distinguished administrative agency.

Nobody realized that Adolf Hitler and the Japanese would suddenly restore railroad earnings. From a peak of 1,252 millions in 1929 the net railway operating income of all U.S. Class I rail carriers sank to 326 millions in 1932 and was still only 373 millions in 1938. Yet it rose to 1,452 millions in 1942. *(Moody's Transportation Manual).* The Second World War ushered in a new era of high railroad prosperity.

The recovery of earnings made the Commission's forfeiture plans confiscatory. The Cotton Belt Route (St. Louis Southwestern) illustrates the procedural *rigor mortis* that led Congress to enact Section 208.

In 1939 Cotton Belt common stock accrued a deficit of $17.53 per share. In 1941, however, it earned $20.23. It earned $41.45 in 1944. And so on, $90.48 per share in 1954. *(Moody's).* And yet on March 10, 1947, this Court denied certiorari to review the Commission's Cotton Belt plan which wiped that stock out. 330 U.S. 836.

Fortunately the district court later was induced to dismiss that reorganization proceeding, because the debtor was able to rehabilitate itself. (And if this Court will grant the relief now herein sought, B&P can probably be rehabilitated too.)

The battles of the late Robert R. Young to save Missouri Pacific stock from similar judicial extinction are well known to this Court. (See Borkin: *Robert R. Young* (1969), pp.

134-136, 219.) That was finally accomplished by the relief of Section 208. See *Missouri Pacific R. Co. Bondholders Committee* v. *Thompson,* (1952) 194 F.2d 799, 802-803.

It is the essence of Section 208 relief that the Court before which the confirmation of the B&P plan is pending on review must stop the confirmation review proceeding in order to allow the *Commission* to pass upon the question of whether subsequent developments warrant changing the plan. It is *not* this Court that is expected to make that finding, but the expert Commission.

If, however, this Court shall brush the Section 208 petition aside, thereby it will also brush aside the statute itself. Petitioner does not believe that such is the Court's deliberate intent.

The passage of 18 months from September 16, 1968 strengthens petitioner's right under Section 208

The petitions already filed under Section 208 (a) invoked its paragraph (2) and asked this Court to find that changes, facts, or developments have occurred which make it expedient for the Commission to reexamine the B&P plan in order to insure that it will be fair and equitable and in the public interest if and when consummated. The Court should accordingly so return the plan.

Surely it cannot now be doubted that there have been "changes, facts, or developments" which make it at least expedient to reexamine. To say this does not entail the Court's making any finding on full plenary review of this case. It is simply a matter of summary judicial notice.

Now, however, since the petitions were filed, 18 months have elapsed since September 16, 1968. That was the date of the Commission's previous report refusing to reexamine the plan under paragraph (1) of Section 208. *Boston & Providence R. Corp. Reorganization,* 333 I.C.C. 713.

Paragraph (1) was not available when the petitions herein were filed. It provides another procedure for Section 208 relief. It requires the Commission to tell the Court (without any prompting from the Court) whether any new developments make it necessary or expedient to reexamine the plan. Paragraph (1) does not even require a rudimentary finding by the Court. However, paragraph (5) of Section 208 requires that petitions under paragraph (1) as well as paragraph (2) shall be transmitted via this Court before which the plan is pending, having been filed before confirmation shall become final.

> Upon the filing of such petition with the court all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the Commission and certification of its action thereon to the court. [Paragraph (5)]

See *Missouri Pacific* v. *Thompson, supra*, p. 803.

The new Providence & Worcester development

On April 7, 1970, the press reported that the Providence & Worcester Railroad enterprise has decided to reject merger into Penn Central, and to stand upon its feet as a carrier. This is a major new development. It follows P&W's current failure to win certiorari along with the New Haven bondholders (October Term 1969, No. 918). The Boston Herald article reports an interview with the P&W president, Robert H. Eder, concluding thus:

> If the Penn Central takes control, he added, "it is unlikely that the company's claims would be resolved in any manner favorable to this company or its minority stockholders."

Significance. The Commission has characteristically adhered to its old finding on the basis of its 1939 record that B&P has no earning power. Hence the Commission's primary method of valuation by capitalizing earning power failed and it resorted to a secondary test, based on what a willing buyer would pay. The New Haven was the only buyer in sight. It held B&P in its captive market and offered to pay piecemeal scrap value, believing that to be the constitutional minimum before the *Hudson Tubes* decision(referred to in the New Haven oral argument before this Court on March 30 as the PATH case). See petition for certiorari, p. 9.

P&W now looms as another connecting carrier which may well be in a position to join in one way or another with Boston & Providence. P&W's great decision has only just now been made, and there has not yet been time to resolve the possibilities for B&P. There should be time if the Section 208 petitions shall be transmitted to the Commission.

The two companies share a common great railroad way northward from Providence Union Station through Pawtucket and Central Falls for 6 miles to Boston Switch near the Massachusetts line, including vast obsolete yard lands awaiting urban conversions. This layout has elements reminiscent of both the Grand Central situation before New Haven's merger and of Oak Point and Harlem River yards. Providence of course is not New York, but it is New England's second metropolis. The P&W also offers a connection between B&P and the Boston & Maine.

Therefore petitioner says that another new development for the Commission to consider is the opportunity for B&P to effect a solution more favorable than the present plan of reorganization through an arrangement with the Providence & Worcester Company.

This is by no means incompatible with sale to the Com-

monwealth of Massachusetts, since it appears that the Commonwealth probably would not want B&P's properties in Rhode Island — and those are the properties with which the Providence & Worcester is involved.

Conclusion

It is emphasized that the petition for certiorari (p. 9) asks the Court simply to instruct the First Circuit to review the B&P plan. Petitioner is confident that one review would correct the plan — which is why the New Haven side has fought so hard to obstruct review.

In reviewing the plan the First Circuit would presumably pass on the effect of the *Hudson Tubes* decision on the liquidation value of a railroad which is *not* going to be liquidated, but which will be operated as an increasing public transportation facility. (The *Hudson Tubes* case came out *after* the first effort to get judicial review.)

Confusion over the old debentures persists. It has scared off one recent potential buyer of the B&P — which is why the New Haven side obstructs their adjudication. Again, all that petitioner asks from the Supreme Court is an order for the lower court to adjudicate the debentures. *This Court is not asked to go into their merits.* And so with the other questions presented in the certiorari petition.

Finally, if this Court is still unwilling to instruct the lower courts as requested -- in face of the clear demand for judicial housekeeping — then petitioner presses its Section 208 petition as follows.

Petitioner requests this Court to treat its Section 208 petition of February 28, 1970, supplemented by this petition of April 8, *first,* as a petition under paragraph (2) of 11 U.S.C. 208(a) and *second,* as a petition under paragraphs (1) and (5) thereof, for immediate referral to the Commission, with this proceeding over confirmation of the plan

meanwhile to be tolled pending receipt of the Commission's report.

Petitioner is concerned that its right to file a Section 208 petition apparently exists only so long as this proceeding to review confirmation of the plan remains pending in this Court.

Respectfully submitted,

ARMISTEAD B. ROOD
Attorney for Petitioner
Development Group

JOSEPH B. HYMAN
Of Counsel
April 8, 1970

I certify that this petition is presented in good faith and not for delay, and that it is restricted to grounds permitted by Rule 58(2).

ARMISTEAD B. ROOD